

Mark C. Mao, CA Bar No. 236165
 Beko Reblitz-Richardson, CA Bar No. 238027
 Erika Nyborg-Burch (admitted *pro hac vice*)
BOIES SCHILLER FLEXNER LLP
 44 Montgomery St., 41st Floor
 San Francisco, CA 94104
 Tel.: (415) 293-6800
 mmao@bsflfp.com
 brichardson@bsflfp.com
 enyborg-burch@bsflfp.com

James Lee (admitted *pro hac vice*)
 Rossana Baeza (admitted *pro hac vice*)
BOIES SCHILLER FLEXNER LLP
 100 SE 2nd St., 28th Floor
 Miami, FL 33131
 Tel.: (305) 539-8400
 jlee@bsflfp.com
 rbaeza@bsflfp.com

Amanda K. Bonn, CA Bar No. 270891
SUSMAN GODFREY L.L.P.
 1900 Avenue of the Stars, Suite 1400
 Los Angeles, CA 90067
 Tel: (310) 789-3100
 Fax: (310) 789-3150
 abonnn@susmangodfrey.com

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
 JEREMY DAVIS, CHRISTOPHER
 CASTILLO, and MONIQUE TRUJILLO
 individually and on behalf of all similarly
 situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

William Christopher Carmody
 (admitted *pro hac vice*)
 Shawn J. Rabin (admitted *pro hac vice*)
 Steven M. Shepard (admitted *pro hac vice*)
 Alexander Frawley (admitted *pro hac vice*)
SUSMAN GODFREY L.L.P.
 1301 Avenue of the Americas,
 32nd Floor
 New York, NY 10019
 Tel.: (212) 336-8330
 bcarmody@susmangodfrey.com
 srabin@susmangodfrey.com
 sshepard@susmangodfrey.com
 afrawley@susmangodfrey.com

John A. Yanchunis (admitted *pro hac vice*)
 Ryan J. McGee (admitted *pro hac vice*)
MORGAN & MORGAN
 201 N. Franklin Street, 7th Floor
 Tampa, FL 33602
 Tel.: (813) 223-5505
 jyanchunis@forthepeople.com
 mram@forthepeople.com
 rmcgee@forthepeople.com

Michael F. Ram, CA Bar No. 104805
MORGAN & MORGAN
 711 Van Ness Ave, Suite 500
 San Francisco, CA 94102
 Tel: (415) 358-6913
 mram@forthepeople.com

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' RESPONSE TO
 GOOGLE'S SUBMISSION RE:
 PRIVILEGE RE-REVIEW (DKT. 566)**

The Honorable Susan van Keulen

1 Plaintiffs respectfully respond to Google's April 29 submission (Dkt. 566) regarding
2 Google's Court-ordered re-review of 1,000 privilege log entries where (i) the document was
3 designated as privileged in the text, but no attorney was identified on Google's privilege log; and
4 (ii) emails where an attorney is in the to, cc, or bcc line but does not respond (Dkt. 542).

5 Plaintiffs now ask that the Court order Google to re-review all additional entries in these
6 two categories. This re-review by Google is warranted based on (1) Google's **37% error rate** with
7 those 1,000 entries (with Google changing its designations for 371 documents) and (2) the high
8 likelihood that Google's re-review of the additional entries will similarly yield production of
9 relevant, non-privileged documents that Google improperly withheld.

10 Google's error rate is alarmingly high, which in itself warrants additional review. Google
11 "chang[ed] its privilege designation" for 371 out of the 1,000 documents. Dkt. 566 at 1. Google's
12 37% error rate for this set of 1,000 entries is even more concerning than, in this Court's own words,
13 the "significant correction rate of 25%" for the first 830 documents that Google re-reviewed. Dkt.
14 522 at 1-2. Google's earlier 25% error rate, for an even smaller set, "g[ave] the Court pause" and
15 led the Court to conclude that "[s]ome form of reassessment of privilege assertions is warranted."
16 Dkt. 522 at 2. Google's subsequent 37% error rate, for an even larger set (which Google
17 characterizes as a "random sample" but "not a representative sample"), shows that further review
18 is necessary. Even Google's initial re-review proposal admitted that an error rate of over 10%
19 warrants additional review. *See* Dkt. 533 (Google submission stating: "If the error rate for these
20 500 documents is over 10%, Google will re-review an additional random sample of 500 documents
21 from the same two categories described above.").

22 Additional review by Google is also warranted given that these Google errors resulted in
23 Google improperly withholding key documents. Google notes that some of these documents were
24 duplicates (116 out of the 371, according to Google), but Google's April 29 production of
25 previously withheld documents contained a treasure trove of unique, key documents (or portions
26 thereof) that Google would have continued withholding but for this Court's re-review Order. For
27 example:
28

- **GOOG-BRWN-00848723:** [REDACTED]

- **GOOG-BRWN-00853326:** [REDACTED]

- **GOOG-BRWN-00850441:** [REDACTED]

- **GOOG-CABR-04780837.R:** [REDACTED]

- **GOOG-CABR-05888096:** [REDACTED]

- **GOOG-BRWN-00848778:** [REDACTED]

- **GOOG-BRWN-00854174:** [REDACTED]

- **GOOG-CABR-05886497:** [REDACTED]

- **GOOG-CABR-05894563:** [REDACTED]

¹ Google previously produced a version of this document where the language quoted here was cut-off, and only visible within the document's metadata. *See* GOOG-BRWN-00157001. By contrast, the withheld version, produced on April 29, 2022, contained this quote in the document itself.

At best, Google's privilege review has been woefully inadequate. Whether these designations were mistakes or intentional, the existence of Google's internal "Communicate with Care" practice raises serious concerns regarding the manner in which documents were created and then reviewed for production. *See, e.g., United States v. Google, LLC*, Case No. 1:20-cv-03010-APM, at Dkt. 326-1 (Mar. 21, 2022, D.D.C.). Google has now re-reviewed almost 2,000 entries from its privilege log and changed its privilege designation for roughly 31% of them. This means that many key documents, like the ones above, are being withheld improperly. Google's April 29 submission does not argue that it would be burdensome to undertake an additional re-review, nor does Google provide any information about how many documents fall into the two categories at issue that would need to be re-reviewed. Whatever the number is, given the circumstances, this is not an undue burden and is proportional to the needs of this case.

For these reasons, Plaintiffs respectfully submit that the Court order Google to re-review all documents on its privilege log where (i) the document was designated as privileged in the document's text, but no attorney was identified on Google's privilege log; and (ii) emails where an attorney is in the to, cc, or bcc line but does not respond. Plaintiffs are continuing to evaluate any additional relief that they make seek in terms of these improperly withheld documents, including for example limited additional deposition testimony.

Dated: May 9, 2022

Respectfully submitted,

By: /s/Amanda Bonn

Mark C. Mao (CA Bar No. 236165)
mmao@bsflp.com
Beko Reblitz-Richardson (CA Bar No. 238027)
brichardson@bsflp.com
Erika Nyborg-Burch (*pro hac vice*)
Enyborg-burch@bsflp.com
BOIES SCHILLER FLEXNER LLP
44 Montgomery Street, 41st Floor
San Francisco, CA 94104
Telephone: (415) 293 6858
Facsimile (415) 999 9695

James W. Lee (*pro hac vice*)
jlee@bsfllp.com
Rossana Baeza (*pro hac vice*)
rbaeza@bsfllp.com
BOIES SCHILLER FLEXNER LLP
100 SE 2nd Street, Suite 2800
Miami, FL 33130
Telephone: (305) 539-8400
Facsimile: (305) 539-1304

William Christopher Carmody (*pro hac vice*)
bcarmody@susmangodfrey.com
Shawn J. Rabin (*pro hac vice*)
srabin@susmangodfrey.com
Steven Shepard (*pro hac vice*)
sshepard@susmangodfrey.com
Alexander P. Frawley (*pro hac vice*)
afrawley@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019
Telephone: (212) 336-8330

Amanda Bonn (CA Bar No. 270891)
abonn@susmangodfrey.com
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: (310) 789-3100

John A. Yanchunis (*pro hac vice*)
jyanchunis@forthepeople.com
Ryan J. McGee (*pro hac vice*)
rmcgee@forthepeople.com
MORGAN & MORGAN, P.A.
201 N Franklin Street, 7th Floor
Tampa, FL 33602
Telephone: (813) 223-5505
Facsimile: (813) 222-4736

Michael F. Ram, CA Bar No. 104805
MORGAN & MORGAN
711 Van Ness Ave, Suite 500
San Francisco, CA 94102
Tel: (415) 358-6913
mram@forthepeople.com

Attorneys for Plaintiffs